Petition

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81-629

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. _____

ANDREW CLARK, Petitioner

v.

STATE OF OREGON, Respondent

PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE STATE OF OREGON

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QUESTIONS PRESENTED

(1) Are the Equal Protection provisions of the Fourteenth Amendment to the United States Constitution violated by the Oregon Constitution and statutory provisions?

Pursuant to Article VII (amended), Section 5 of the Constitution of the State of Oregon and Oregon Revised Statutes, in felony criminal cases the prosecution is given unqualified discretion to use one of two separate and distinct alternative processes.

Preliminary Hearing Process: A hearing before a magistrate where probable cause must be established. This is an adversary setting in which the defendant and his counsel participate.

Grand Jury Process: A secret proceeding before seven grand jurors. Only

the prosecutor and prosecution witnesses are heard.

The grand jury process does not accord a defendant any of the following:

1.	ORS 135.070	Right to information as to charge, right to counsel, advice of rights concerning any statements given.
2.	ORS 135.073	Exclusion of any statement by defendant when not advised of rights.
3.	ORS 135.075	Right to assistance of and in obtaining counsel.
4.	ORS 135.080	Provision for appointed counsel's affidavit of expenses; payment of expenses and fees.
5.	ORS 135.085	Right to subpoena witnesses.
6.	ORS 135.090	Right to cross-examination of adverse witnesses.
7.	ORS 135.095	Right of defendant to make or waive making a statement.
8.	ORS 135.100	Right of defendant to make limited statement.

9.	ORS 135.105	Provision for use of defendant's statement before grand jury or on trial.
10.	ORS 135.115	Requirement of memorandum of defendant's waiver of right to make statement.
11.	ORS 135.125	Provision for examination of defendant's witnesses.
12.	ORS 135.135	Right to exclusion of witnesses during examination of others.
13.	ORS 135.145	Provision for memorandum relative to witnesses.
14.	ORS 135.155	Provision for retention of statements and depositions by magistrate; inspection.

All of the above are accorded a defendant processed through the preliminary hearing process.

All of the above were denied Petitioner. Objection to being prosecuted by the grand jury process was raised by timely motion.

(2) Are the Due Process and Equal Protection provisions of the

Fourteenth Amendment to the United States Constitution violated by Oregon's statutes relating to the granting of witness immunity in criminal proceedings?

The prosecution is empowered by ORS 136.619 to grant the broader "transactional" form of immunity to reluctant witnesses. No provisions exist whereby a defendant can grant any form of immunity whatsoever to reluctant witnesses. If a defendant could grant the narrower "use" form of immunity, the imbalance which now exists in the power to compel the testimony of recalcitrant witnesses would be greatly reduced without in any way interfering with the State's subsequent ability to prosecute such a witness.

Further, the decision-making process whereby a prosecutor determines whether to immunize a particular witness is not now governed by any articulable

standards, and, being wholly discretionary in nature, is not subject to any judicial scrutiny either before or after the immunity grant is made.

No grant of immunity was ever offered to Petitioner, though a number of other culpable individuals received such grants, and no written standards existed to guide the prosecution in its otherwise arbitrary determination. Petitioner raised timely objection to this procedure.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. _____

ANDREW CLARK, Petitioner

v.

STATE OF OREGON, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Oregon, made and entered in the above cause on July 28, 1981, reprinted in Appendix A, hereto infra, page A-1.

OPINIONS BELOW

The Letter constituting a denial by the Oregon Supreme Court of Petitioner's Petition for Rehearing is reprinted in Appendix A, hereto, infra, page A-1.

The opinion of the Supreme Court of the State of Oregon is reprinted in Appendix A, hereto, infra, pages A-2-30, cited as 291 Or 231, ___ P2d ___ (1981).

The opinion of the Court of Appeals for the State of Oregon is reprinted in Appendix A, hereto, infra, pages A-31-34, cited as 47 Or App 389, 615 P2d 1043 (1980).

The Orders of the Trial Court denying Petitioner's Motions to Dismiss the Indictment are reprinted in Appendix A, hereto, infra, pages A-36-37 and A-38-39.

JURISDICTION

The judgment of the Supreme Court of the State of Oregon was made and entered June 23, 1981.

Within the time permitted, Petitioner filed a Petition for Rehearing which was denied by the Supreme Court of the State of Oregon by letter order dated July 28, 1981, as set forth in Appendix A, hereto, infra, page A-1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States constitutional provision involved in both Questions Presented is the Fourteenth Amendment:

> Amendment XIV "* * * nor shall an state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Oregon constitutional provision involved is Article VII (amended), Section 5, subsections (2) through (6):

> **Section 5. Juries; indictment; information; verdict in civil cases.**
>
> * * *
>
> (2) A grand jury shall consist of seven jurors chosen by lot from the whole number of jurors in attendance at the court, five of whom must concur to find an indictment.
>
> (3) Except as provided in subsections (4) and (5) of this section, a person shall be charged in a circuit court with the commission of any crime punishable as a felony only on indictment by a grand jury.
>
> (4) The district attorney may charge a person on an information filed in circuit court of a crime punishable as a felony if the person appears before the judge of the circuit court and knowingly waives indictment.
>
> (5) The district attorney may charge a person on an information filed in circuit court if, after a preliminary hearing before a magistrate, the person has been held to

> answer upon a showing of probable cause that a crime punishable as a felony has been committed and that the person has committed it, or if the person knowingly waives preliminary hearing.
>
> (6) An information shall be substantially in the form provided by law for an indictment. The district attorney may file an amended indictment or information whenever, by ruling of the court, an indictment or information is held to be defective in form.
>
> * * *

First Question Presented:

The Oregon Revised Statutes involved are the applicable statutes listed under First Question Presented, supra, at page 1. The full text of the statutes is set forth in Appendix B, infra, pages B-1-8.

ORS 132.090 Presence of persons at sittings or deliberations of jury.

ORS 132.310 Inquiry into crimes; presentation to court.

ORS 135.070 Information as to charge, right to counsel, use of statement and preliminary hearing.

ORS 135.073 Statement by defendant when not advised of rights.

ORS 135.075 Obtaining counsel.

ORS 135.080 Affidavit on court appointed counsel.

ORS 135.085 Subpenaing [sic] witnesses.

ORS 135.090 Examination of adverse witnesses.

ORS 135.095 Right of defendant to make or waive making a statement.

ORS 135.100 Statement of defendant.

ORS 135.105 Use of statement before grand jury or on trial.

ORS 135.115 Memorandum of waiver of right to make statement.

ORS 135.125 Examination of defendant's witnesses.

ORS 135.135 Exclusion of witnesses during examination of others.

ORS 135.145 Memorandum relative to witnesses.

ORS 135.155 Retention of statements depositions by magistrate; inspection.

Second Question Presented:

The Oregon Revised Statutes involved are the applicable statutes listed under Second Question Presented, supra, at page 3, and reproduced in full in Appendix B, infra, pages 7-8.

ORS 136.617 Proceedings to compel witness who may be incriminated thereby to testify.

ORS 136.619 Immunity of witness compelled to testify.

STATEMENT OF THE CASE

This is a criminal case. The Petitioner was charged by the Benton County Grand Jury with the offense of Theft in the First Degree.

Prior to trial, the Petitioner filed two separate Motions to Dismiss the Indictment encompassing the issues raised

herein under Questions Presented, supra, at p. 3. In each motion, a violation of the Fourteenth Amendment to the United States Constitution was alleged. The trial court denied each motion noting in each instance that federal questions had been raised. See Appendix A, infra, pp. A-36-38.

Upon trial, Petitioner was convicted by a jury of the lesser included offense of Theft in the Second Degree.

Petitioner was sentenced to one (1) year imprisonment. He was bench-paroled after serving four (4) months.

On appeal to the Oregon Court of Appeals, the Petitioner raised the denial of the two Motions to Dismiss the Indictment as error. In an opinion affirming the trial court's denial of each motion, the Court of Appeals recognized that Petitioner based his motions

upon the Fourteenth Amendment to the United States Constitution. See Appendix A, infra, p. A-32.

On Review to the Oregon Supreme Court, Petitioner again raised the denial of both motions as a ground for appeal, citing in each instance the Fourteenth Amendment to the United States Constitution. The Court's opinion acknowledges that Petitioner in fact did raise federal questions under each separate motion. See Appendix A, infra, p. A-3.

ARGUMENT AMPLIFYING REASONS FOR GRANTING WRIT

Denial of Post-Indictment Preliminary Hearing

The question presented is whether or not Oregon's concededly unequal treatment of "Felony Charged Defendants" is constitutionally defensible. Pursuant to the present Oregon constitutional and

statutory provisions, one group of "Felony Charged Defendants," before being chargable in a trial court, are accorded the following protections:

(1) The right to counsel - ORS 135.070, 135.075;

(2) The right to cross-examine and confront witnesses - ORS 135.090;

(3) The right to subpoena witnesses - ORS 135.085;

(4) The right to present evidence - ORS 135.090;

(5) The right to make an unsworn statement that may be considered at trial in lieu of the defendant testifying at trial - ORS 135.100, 135.105;

while another group of "Felony Charged Defendants" are accorded none of the above.

The law is patently devoid of standards, and the Oregon Supreme Court now refuses to require the prosecution to

demonstrate any rational basis for the choice adopted.

Additionally, the court conceded the following:

(1) The procedures afforded in a preliminary hearing are potentially important to an accused because:

(a) They make it possible to defend against an unjustified charge; See Appendix A at p. A-6

(b) They ensure an accused has the right to the judgment of a trained judicial officer whether or not probable cause for prosecution has been shown; See Appendix A at p. A-5

(2) Persons who receive preliminary hearings gain important advantages

over persons prosecuted by grand jury indictments; Id., at p. A-19

(3) The opportunity of a preliminary hearing is a "privilege" within the meaning of Oregon's constitutional guarantee, and potentially one of great importance. Id, at p. A-17.

(4) The grant or denial of this "privilege" is controlled wholly and entirely by the prosecution such that the accused is powerless to influence the outcome of this critical determination. Id.

Each of the above-enumerated rights protect fundamental interests at a critical stage of the proceedings. Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 114 (1970); White v. Maryland, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1963); Hamilton v. Alabama, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961).

Oregon's dual system impinges on "fundamental interests" protected by the United States Constitution and thus are to be subjected to "strict scrutiny" by this Court. San Antonio School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16, rev den 411 U.S. 959, 93 S.Ct. 1919, 36 L.Ed.2d 418 (1973); State Board of Elections v. Socialist Workers' Party, 440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979). Therefore, the State of Oregon must bear the heavy burden to justify this otherwise unconstitutional scheme.

Recognizing that the prosecution could not meet its burden, the Oregon Supreme Court sought to avoid the otherwise obvious conclusion that such a dual scheme was unconstitutional, by creating artificial classes of "indicted" and "non-indicted" individuals. See Appendix A at p. A-20. In fact, it is obvious that

there is but a single class of affected persons--those being "Felony Charged Defendants." This class has been recognized historically since early common law and is specifically designated by Oregon statute. Further evidence to support such a finding lies in the Oregon Legislature's denial of a preliminary hearing to misdemeanor-charged defendants who are charged by information without a preliminary hearing. ORS 131.005 (9) (a).

The fallacy of the Oregon Supreme Court's two-class analysis is obvious and apparent. In Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the defendant was entitled to counsel, not because of his ethnic background or because he was an Arizona citizen; he was entitled to counsel because he was charged with felonious conduct. That is the class he belonged to

which entitled him to that protection. Petitioner belongs to a similar class; therefore, he is entitled to the same protections as all other members of that class.

The Oregon law can no more deny Petitioner benefits and advantages of a preliminary hearing than it can deny to some criminal defendants the right to counsel and give it to others, or give some a jury of twelve and others only six, or give some a unanimous verdict and others a "ten to two" verdict.

The concept espoused by the Oregon Supreme Court has been asserted before. In essence, it relies on a fundamental flaw of reasoning, i.e., that alternative procedures which each meet minimal due process requirements are "equal." Thus, they reason, "Felony Charged Defendants" validly receive separate but equal treatment.

In Plessy v. Furgeson, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), the doctrine of "separate but equal" was proffered. In Brown v. Board of Education, 347 U.S 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), this Court struck down as an unconstitutional denial of equal protection this concept of substantially equal, though separate, facilities in education.

Nowhere can there be a clearer instance of the same discriminatory classification than the present Oregon scheme for processing "Felony Charged Defendants."

Having failed to properly identify the class, "Felony Charged Defendants," the Oregon Supreme Court compounds its misconception by citing holdings of this Court that sanction different treatment when each procedure, taken individually, meets minimal due process requirements. The Oregon Supreme Court has

simply failed to acknowledge that alternative procedures cannot, when taken together, violate the express prohibitions against the denial of equal protection.

Oregon has three options, any of which are a remedy sufficient to ensure that "Felony Charged Defendants" receive equal protection of the law:

(1) Abolish the Grand Jury Process; or

(2) Abolish the Preliminary Hearing Process; or

(3) Provide to indictees preliminary hearings afforded to persons charged by way of district attorney's information.

It is Petitioner's contention that the third proposed remedy can be implemented without unduly burdening Oregon's criminal justice system. In fact, such a procedure is now in effect as

mandated by this Court's decision in Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), holding that parolees are entitled both to a preliminary hearing and a formal revocation proceeding.

It is clear that granting a post-indictment preliminary hearing is going to be no more burdensome a remedy; and given its present widespread use, it will have only marginal impact on Oregon's judicial resources.

Inequality of Immunity Grant Powers

Under Oregon statutes, ORS 136.617, 136.619, the prosecution, not the defendant, can immunize witnesses; thereby compelling them to testify in criminal cases. There can be no question that this is a powerful prosecutorial tool and one which has been recognized as strengthening

the prosecution's hand. Kastigar v. United States, 406 U.S. 411, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972).

This Court also has previously noted that the adversary system of trial is hardly an end in itself, and:

> [There is] ample room . . . . . at least as far as due process is concerned for [a rule] which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence. Wardius v. Oregon, 412 U.S. 470, 474, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973) citing Williams v. Florida, 399 U.S. 78, 26 L.Ed.2d 446, 90 S.Ct. 1893 (1970).

Wardius, supra, holds that discovery must be a reciprocal process, unless the prosecution can show significant governmental interests which might support the lack of reciprocity.

In the instant case, because of what the Petitioner seeks, neither significant nor any governmental interests are affected.

All Petitioner sought under Wardius, supra, and was denied by the Oregon Supreme Court, was the opportunity to grant use immunity to witnesses who would otherwise decline to testify for fear, themselves, of prosecution. In Kastigar, supra, this Court held that a grant of use immunity was sufficient to compel testimony over a claim of the privilege against self-incrimination. Given the Kastigar holding, the Petitioner neither seeks nor requires an opportunity to grant the more comprehensive transactional immunity authorized by Oregon statutes.

Authorizing the Petitioner to grant use immunity to a witness in no

way deprives the State of any powers it may have to prosecute the witness for a crime about which he testifies. The State loses nothing and in fact gains the strategic advantage of examining the witness under oath.

The Due Process Clause protects a defendant's right to a full and fair trial. On more than one occasion, this Court has closely scrutinized state trial rules which enable the prosecution to receive tangible tactical benefits without having to reciprocate; all at the expense of a fair trial. See e.g. Washington v. Texas, 388 U.S. 14, 22, 18 L.Ed.2d 1019, 87 S.Ct. 1920 (1967); Gideon v. Wainwright, 372 U.S. 335, 344, 9 L.Ed.2d 789, 83 S.Ct. 792 (1963). Petitioner seeks no more than is reasonable and necessary to ensure he receives a fair trial and that the remedies to the discovery process in Oregon

mandated by Wardius, supra, are meaningfully implemented.

A separate, though related, issue exists concerning the manner in which a prosecutor arrives at a decision as to who gets immunity and who does not.

In the instant case, no standards existed by which the prosecution was legally bound in arriving at its determination to grant immunity; nor were there any proceedings involving the juciciary in connection with any of the immunity grants made. (May 31, 1979 Hearing Tr 35, 43, 44) The Petitioner himself was never offered immunity (May 31, 1979 Hearing Tr 54).

It is the lack of any articulated standards which the Petitioner contends has denied him equal protection of the laws. Under the requirements formulated by the Oregon Supreme Court's opinion,

an unnecessary and unjustified burden has now been placed upon Petitioner. See Appendix A at p. A-24. He must now demonstrate "a discriminatory practice, or [an] illegitimate motive," Id., in order to sustain an equal protection claim. Meeting this burden is nearly impossible since no standards exist identifying what these "illegitimate" or "discriminatory" practices might consist of; and all evidence which could support such a claim rests with the prosecution and, is in reality, unavailable to the Petitioner.

CONCLUSION

For the foregoing reasons, Petitioner prays that a Writ of Certiorari issue to review the judgment rendered by the Oregon Supreme Court.

Respectfully submitted,

ROBERT J. McCREA
Counsel for Petitioner

APPENDIX A

Table of Contents

. Order Denying Petition for Rehearing

. Opinion of the Oregon Supreme Court

. Opinion of the Oregon Court of Appeals

. Orders of the Trial Court Denying Motions to Dismiss the Indictment

S U P R E M E C O U R T
ADMINISTRATIVE OFFICE
SUPREME COURT BLDG.
SALEM, OREGON 97310

July 28, 1981

Robert J. McCrea
Attorney at Law
1147 High Street
Eugene, Oregon 97401

Re: State v. Andrew Clark
CA 15862 SC 27251

Dear Mr. McCrea:

The Supreme Court today denied petitioner's Petition for Rehearing in the above-entitled matter.

This letter constitutes the order of the Supreme Court denying the petition.

Very truly yours,

/s/ Marilyn Hartley
Supreme Court
Calendar Clerk

MH/np
cc: John C. Bradley

IN THE SUPREME COURT OF THE
STATE OF OREGON

STATE OF OREGON,
Respondent,
v.
ANDREW CLARK,
Petitioner.

(TC 35188, CA 15862, SC 27251)

On Review from the Court of Appeals.*

Argued and submitted December 3, 1980.

Robert J. McCrea, of Morrow, McCrea & Divita, P.C., Eugene, argued the cause and filed a brief for petitioner.

John C. Bradley, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief were James M. Brown, Attorney General, and Walter L. Barrie, Solicitor General.

Before Denecke, Chief Justice, and Tongue, Lent, Linde, Peterson and Campbell, Justices.

LINDE, J.

Affirmed.

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*Appeal from Circuit Court, Benton County. Frank D. Knight, Judge. 47 Or App 389, 615 P2d 1043 (1980).

LINDE, J.

Defendant was convicted of theft in the second degree. On appeal, he assigned as error the trial court's denial of two pretrial motions to dismiss the indictment on constitutional grounds. One of these motions claimed that defendant was denied equal protection of the law because he was prosecuted and potential codefendants were given immunity without reference to any standards for the disparate treatment, and because he could not obtain the testimony of witnesses by granting them immunity from the use of their testimony against themselves, as the state may do or assist other defendants to do. The second motion to dismiss the indictment claimed that the failure to accord defendant a preliminary hearing after his indictment denied him due process and equal protection of the law under a number of state and federal constitutional provisions.[1] The Court of Appeals rejected these constitutional claims, 47 Or App 389, 615 P2d 1043 (1980), and we allowed review. We affirm the conviction.

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[1] Defendant relies primarily on Or Const Art I, § 20, and on the provisions of U S Const amend 14, § 1, that "[n]o state shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The singular "law" is used in defendant's equal protection argument, which refers collectively both to the state and the federal provision. Defendant cited Or Const art I, §§ 10 and 11, and the federal sixth amendment as "fundamental" rights which were not made "equally" available to him. He did

I. Denial of a preliminary hearing.

Oregon law provides for charging a person with a felony either by grand jury indictment or by a district attorney's information. Article VII (amended), section 5, of the Oregon Constitution permits a district attorney to charge a person on an information filed in circuit court only after a showing of probable cause in a preliminary hearing before a magistrate, unless the person waives indictment or waives the preliminary hearing.[2] At the preliminary hearing a panoply of procedural guarantees protect the person's right to contest the evidence of probable cause that he has committed a felony and his right not to become a witness against himself.[3] These include the right

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(Cont.) not explain his citation of Or Const art I, §§ 15 and 16. Cf Sterling v. Cupp, 290 Or 611, 625 P2d 123 (1981), note 1 and cases there cited, Megdal v. Board of Dental Examiners, 288 Or 293, 296, 605 P2d 273 (1980).

The dissent asserts that defendant abandoned his reliance on Or Const art I, § 20, on appeal, though it was a basis of his motion in the trial court. Defendant's principal argument, however, was predicted on Hawkins v. Superior Court, 22 Cal3d 584, 586 P2d 916 (1978), a decision based entirely on state rather than federal grounds. In any event, he could not have excluded issues of state law by pitching his attack on 14th amendment grounds. Cf. State v. Spada, 286 Or 305 (1979). The case was argued together with State v. Edmonson, also decided today, which presented the same issue of equal rights, based in part on art I, § 20, and there can be no claim that examination of that issue under the Oregon Constitution before the 14th amendment took respondent by surprise.

to the aid of counsel, ORS 135.070, 135.075; the right to subpoena witnesses, ORS 135,085; cross-examination of adverse witnesses, ORS 135.090; the right to make an unsworn statement subject only to limited questioning by the magistrate, ORS 135.095, 135.100; and ultimately, the right to the judgment of a trained judicial officer whether probable cause for the prosecution has been shown, based on evidence which the person to be charged could challenge or meet by opposing evidence or by his own statement, if he chose to do so. ORS 135.175, 135.185.

No comparable procedural rights are accorded a person charged before a grand jury. To the contrary, the statutes

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[2] Or Const art VII (amended) § 5:

"(4) The district attorney may charge a person on an information filed in circuit court of a crime punishable as a felony if the person appears before the judge of the circuit court and knowingly waives indictment.

"(5) The district attorney may charge a person on an information filed in circuit court if, after a preliminary hearing before a magistrate, the person has been held to answer upon a showing of probable cause that a crime punishable as a felony has been committed and that the person has committed it, or if the person knowingly waives preliminary hearing."

[3] These procedures are spelled out in statutes; the constitution itself does not define "preliminary hearing." ORS 135.070 - 135.185. The statutes use the male pronoun collectively for either gender.

provide that only the prosecutor and a witness actually under examination shall be present during grand jury sittings, unless a court orders the presence of a reporter of testimony or other necessary attendants, ORS 132.090; the grand jury need not hear any evidence for the defendant, ORS 132.320(4); and it may find an indictment upon the apparent strength of prosecution evidence "if unexplained or uncontradicted" although the defendant had no opportunity to test, explain, or contradict the evidence. ORS 132.390.

Unquestionably the procedures afforded in a preliminary hearing are potentially important to an accused, whether or not they are advantageous in a particular instance. In theory, at least, the preliminary hearing is designed to make it possible for an accused to avoid defending against an unjustified charge, even if more often it only permits him to learn something of the prosecution's case against him that would be hidden in grand jury secrecy. Cf. ORS 135.855(1)(c); State ex rel Johnson v. Roth, 276 Or 883, 557 P2d 230 (1976); compare State v. Hartfield, 290 Or 583 624 P2d 588 (1981). In his original motion, defendant included a reference to "due process," presumably intending to invoke that clause of the federal fourteenth amendment.[4] Grand jury

[4] Supra, n. 1. As a constitutional premise, the phrase "due process" must refer to this federal clause and must be supported by interpretation of the clause in decisions of the United States Supreme Court or of other courts based on such decisions, since the phrase does not appear in the Oregon Constitution. See Megdal v. Board of Dental

indictment itself can hardly be argued to contravene due process, being included in the same fifth amendment by which "due process" entered constitutional law, and defendant offers no support or serious argument for the proposition that the evolution of due process now requires an opportunity to contest the factual basis of an indictment in a pretrial judicial hearing. Defendant's chief claim, however, is not that an opportunity to discover the prosecution's case or to contest it before trial is constitutionally mandated, but rather that a law which does provide such an opportunity must be applied according to constitutional standards, including the constitutional standards of equality. That much, of course, is true.[5] We therefore turn to those constitutional standards.

Article I, section 20. Defendant does not spell out the distinct premises

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(Cont.) Examiners, supra, n. 1. It will avoid needless confusion if "due process" is not used to refer generically to whatever procedures may be required by other sources or state or federal law. No such other sources are quoted or argued in this case.

[5] The fact that a procedure, a power, or a program is itself stated in the constitution, as are the provisions for indictment and information, does not relieve them from compliance with other constitutional standards unless these are expressly excluded. There are many such provisions placed in the Oregon Constitution (e.g. sale of alcoholic liquor, art I, § 39, educational funding, art VIII,

of his "equal protection" attack, relying only on the decision of the Supreme Court of California in Hawkins v. Superior Court, 22 Cal3d 584, 586 P2d 916 (1978). The Hawkins decision held that indicted defendents must be afforded preliminary hearings equally with defendants charged by an information in order to meet the equality guarantee of California's constitution.[6] Before turning to the Hawkins court's analysis, therefore, it is necessary to review the comparable Oregon guarantee.

Article I, section 20 provides:

"No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

(Cont.) §§ 2-5, and the bonding authorities of article XI-A through H) that are not thereby placed beyond the guarantees in article I, the Bill of Rights.

[6] California Const art I, § 7.

"(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal preotection [sic] of the laws.

"(b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked."

Like the California court, we scrutinize the challenged action under the Oregon Constitution before the fourteenth amendment. See Sterling v. Cupp, 290 Or 611, 613-614 and notes 1, 2, 625 P2d 123 (1981).

This guarantee, taken like most of article I from Indiana's constitution of 1851, has been a part of the Bill of Rights since Oregon became a state in 1859. Antedating the Civil War and the equal protection clause of the fourteenth amendment, its language reflects early egalitarian objections to favoritism and special privileges for a few rather than the concern of the Reconstruction Congress about discrimination against disfavored individuals or groups.[7] See City of Klamath Falls v. Winters, 289 Or 757, 618 P2d 418 (1980), quoting State ex rel Reed v. Schwab, 287 Or 411, 417, 600 P2d 387 (1979).[8] The original concern of article I, section 20, with special privileges or "monopolies" was the basis of early decisions concerning the licensing of sailors' boarding houses, White v. Holman, 44 Or 180, 74 P 933 (1904), or fishing rights, e.g. Monroe v. Withycombe, 84 Or 328, 165 P 227 (1917).

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[7] Ind Const art I, § 23 (1851). Its direct predecessors were Iowa Const art I, § 6 (1846), Mich Const art I, § 3 (1835), Tenn Const art XI, § 9 (1834). The original state declarations of rights had proscribed, more narrowly, "exclusive or separate emoluments or privileges from the community, but in consideration of public services," Va Decl of Rights § 4 (1776) (similarly Mass Decl of Rights § VI (1780)), repeated in many state constitutions. Compare, as to the equal protection clause, Frank & Munro, The Original Understanding of "Equal Protection of the Laws," 1972 Wash U L Q 421 (1972).

[8] The quotation, taken from State v. Savage, 96 Or 53, 59, 184 P 567 (1919), 189 P 427 (1920), reads:

Because the clause would ordinarily be invoked by persons who wanted a privilege or immunity for themselves rather than to withdraw it from others, its protective effect was soon held to extend to rights against adverse discrimination as well as against favoritism. See, e.g., State v. Wright, 53 or 344, 100 P 296 (1909) (reversing a conviction for unlicensed peddling because peddlers of other goods did not require licenses), and its use against discriminatory or otherwise "unequal" adverse treatment is long established. See City of Klamath Falls v. Winters, supra, and cases cited at 289 Or 775-777.

More important to the present case is the dual test of the proscribed kinds of discrimination or unequal treatment. The clause forbids inequality of privileges or immunities not available "upon the same terms," first, to any citizen, and second, to any class of citizens. In

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(Cont.) "The provisions of the state Connstitution [sic] are the antithesis of the fourteenth amendment in that they prevent the enlargement of the rights of some in discrimination against the rights of others, while the fourteenth amendment prevents the curtailment of rights . . ."

289 Or at 774-775. Theoretically the converse perspectives of the two clauses could bear on whether a forbidden differentiation should be resolved by depriving the favored class of its unequal benefits under article I, section 20, or by extending the benefits to those who were "denied equal protection," but such a choice is not involved in this case.

other words, it may be invoked by an individual who demands equality of treatment with other individuals as well as by one who demands equal privileges or immunities for a class to which he or she belongs. Because constitutional attacks under article I, section 20 mostly have been directed at laws prescribing general rules for one or another class of subjects, these attacks, as well as most judicial opinions, have been phrased in the rhetoric of forbidden "classification," but that is only one of two distinct grounds of attack. A classic example of the other, individual, basis is Altschul v. State, 72 Or 591, 144 P 124 (1914), which invalidated a law permitting a named person to sue the state.

This dual coverage of article I, section 20, was recognized in the first case under the section, In re Oberg, 21 Or 406, 28 P 130 (1891). A constable convicted of arresting a sailor on board a vessel as an absconding debtor, contrary to a law prohibiting such arrests, claimed that the law was unconstitutional as a special immunity for seamen. In rejecting his claim, this court said:

> "All sailors of a seagoing vessel within the prescribed limits are treated alike, and entitled to enjoy the privileges or immunities granted. The act prescribes the same rule of exemption to all persons placed in the same circumstances. It does not grant to a sailor immunity from arrest for debt, and refuse it to his neighbor, if they be similarly situated. The same privilege or immunity is extended by the act to all in the same situation. Any person who is a sailor may enjoy the immunity, and any

> citizen desiring such immunity may have it in the words of the constitution, 'upon the same terms,' by becoming a sailor. While one may enjoy the benefit of the exemption, and another may not, this results not because the statute favors one, and discriminates against another, but because one brings himself within its terms, and the other does not."

21 Or at 408. The court quoted the Iowa court, stating of a comparable statute in McCormick v. Rusch, 15 Iowa 127, 129 (1863):

> "It does not prescribe one rule for one citizen or soldier, and another for his neighbor, if they be in the same situation. We have a statute regulating continuances on account of the absence of witnesses, which gives a uniform rule to all litigants. And yet one may be entitled to a continuance and another not. This results, not because a different rule is prescribed for each, but because one brings himself within its terms and the other does not. . . ."

Id. And the Oberg court continued with quotations to the same effect from Tennessee[9] and the following from the United States Supreme Court:

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9 "[T]his clause of the constitution only prohibits the suspension of a general law or the grant of privileges, immunities or exemptions to an individual or individuals. It does not prohibit legislation for the benefit of classes composed of any members of the community who may bring themselves within the class."

> "The discriminations which are open to objection are those where persons engaged in the same business are subject to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws. (Soon Hing v. Crowley, 113 U. S. 709.)"

21 Or at 411.

It has thus been clear from the earliest judicial discussion of article I, section 20, that this section is a guarantee against unjustified denial of equal privileges or immunities to individual citizens at least as much as against unjustified differentiation among classes of citizens. It also was early established that the guarantee reaches forbidden inequality in the administration of laws under delegated authority as well as in legislative enactments. White v. Holman, supra, held that a board of commissioners had violated article I, section 20, in denying petitioners a license to maintain a sailors' boarding house because the board had not used objective standards for selecting qualified licensees but rather had followed the recommendations of shipowners that the business be limited to another firm's boarding house. Similarly, in Monroe v. Withycombe, supra, this court said that if the legislature could not itself directly authorize exclusive fishing rights for some persons, it could not authorize a master fish warden to do so indirectly. 84 Or at 336. And in State v. Cory, 204 Or 235, 282 P2d 1054 (1955), the

court recognized a violation of article I, section 20 as well as the fourteenth amendment in the wholly standardless administration, with "no yardstick or semblance of classification," of discretion given district attorneys under a habitual criminal act. 204 Or at 240.

One branch of article I, section 20, and decisions under it thus call for analysis whether the government has made or applied a law so as to grant or deny privileges or immunities to an individual person without legitimate reasons related to that person's individual situation. More frequent cases have involved attacks on statutes under the branch of the guarantee that forbids laws granting or denying a privilege or immunity to a class of citizens. The two are sometimes interrelated, for when wholly standardless application of a general law to individual cases is avoided by formal or informal criteria, these criteria in turn must pass muster under "classification" analysis.[10]

That mode of analysis has notorious difficulties, which this court has not escaped.[11] As Hawkins v. Superior Court, supra, on which defendant relies, used this approach, we deal with it here. Without reviewing the course of this

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[10] In such cases, however, the constitutional issue normally would be avoided by interpreting the law in a manner consistent with the constitutional guarantee. See State v. Smyth, 286 Or 293, 296, 593 P2d 1166 (1979); Oregon Medical Association v. Rawls, 281 Or 293, 300, 574 P2d 1103 (1978), and cases there cited.

court's decisions, a few fundamental points suffice for the purposes of the present case.

The terms "class" and "classification" are invoked sometimes to mean whatever distinction is created by the challenged law itself and sometimes to refer to a law's disparate treatment of persons or groups by virtue of characteristics which they have apart from the law in question. Familiar examples of the latter kind of "class" are personal characteristics such as sex, ethnic background, legitimacy, past or present residency or military service. On the other hand, every law itself can be said to "classify" what it covers from what it excludes. For instance, the rule of this court that limits the time for filing a petition for review (Rule 10.05) "classifies" persons by offering the "privilege" of review to those who file within 30 days and denying it to those who file later. Similarly, a law that licenses opticians and optometrists to perform different functions, see Williamson v. Lee Optical, 348 US 483, 75

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11 "Words like . . . 'equal' in any constitutional formula, expressing a principle that like shall be treated alike, cannot rise beyond tautology without deciding what is alike for constitutional purposes, i.e., what are distinctions without a constitutionally permissible difference or what known forms of inequality the particular clause was meant to end. . . ."

Tharalson v. State Dept. of Rev., 281 Or 9, 15 n. 10, 573 P2d 298 (1978).

S Ct 461, 99 L Ed 2d 563 (1955), does not grant or deny privileges to classes of persons whose characteristics are those of "opticians" and "optometrists"; rather, the law creates these classes by the licensing scheme itself. Attacks on such laws as "class legislation" therefore tend to be circular and, as the above quotations from early decisions show, have generally been rejected whenever the law leaves it open to anyone to bring himself or herself within the favored class on equal terms. See also Jarvill v. City of Eugene, 289 Or 157, 184-185, 613 P2d 1 (1980) (sustaining limitations on privilege to use public parking facilities).

For like reasons, different treatment of comparable facts at different geographic locations within the state is not necessarily a denial of equal privileges or immunities under article I, section 20. It may or may not be. The answer depends in part on the level of government that makes the law. When local governments make and administer their own policies, obviously these policies legitimately may produce different privileges or immunities from those available elsewhere, as long as the guarantees of article I, section 20, are observed within the reach of the local law. The same may be true when state legislation leaves the choice among policies to local agencies. See City of Klamath Falls v. Winters, supra (choice between two channels of prosecution and appeal); Olsen v. State ex rel Johnson, 276 Or 9, 554 P2d 139 (1976) (level of school taxes and expenditures). On the other hand, when the state makes and administers its own laws, geographic

distinctions are tested by the usual criteria of equal privileges and immunities or equal protection. See, e.g. Bock v. Bend School Dist. No. 1, 252 Or 53, 448 P2d 521 (1968) (sustaining teacher tenure law limited to large school districts); State v. Kincaid, 133 Or 95, 285 P 1105 (1930) (sustaining conviction under a license law that did not apply in populous cities); State ex rel Bell v. Frazier, 36 Or 178, 59 P 5 (1899) (sustaining special fees for court officials and sheriffs in populous county).

Application to this case. The foregoing summary of the several distinct issues that can arise under article I, section 20, serves to isolate the issue that is presented by defendant's reliance on Hawkins v. Superior Court, supra.

There is no question that the opportunity of a preliminary hearing is a "privilege" within the meaning of the constitutional guarantee, and potentially one of great practical importance. The grant or denial of this privilege is controlled by the state's choice, acting through the district attorney, to proceed by indictment or by information. Defendant's attack, under Hawkins, is on the "classification" between persons who are charged by information and accorded a preliminary hearing and persons who are indicted and denied such a hearing. He does not assert that he was singled out for discriminatory treatment either as an individual or as a member of a disfavored minority,[12] or that in practice the privileges of state law do not "upon the same terms . . . equally belong to all citizens" throughout the state, instead giving the privilege to one

citizen and refusing it to his "neighbor . . . in the same situation," In re Oberg, supra, without the use by prosecutors of any "yardstick or semblance of classification which would enable the district attorney to determine under what circumstances an information should be filed," State v. Cory, supra, 204 Or at 240. Rather, the Hawkins attack is directed simply at the coexistence of the two alternative procedures by which to initiate a criminal prosecution, one of which includes a preliminary hearing and the other of which does not.

In City of Klamath Falls v. Winters, supra, this court also dealt with the existence of two separate procedures available to prosecute the same offense either in a municipal court, with a new trial in circuit court but no further appeal, or in a district court with an appeal to the Court of Appeals. There the court found it "difficult to state categorically which system offers greater advantages to defendants." 289 Or at 761. In the present case, we agree with the California court in Hawkins that the

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[12] The court rejected such a claim asserted under the federal equal protection clause in Bailleaux v. Gladden, 230 Or 606, 370 P2d 722 (1962), following State v. Hicks, 213 Or 619, 325 P2d 794 (1958), apparently distinguishing Yick Wo v. Hopkins, 118 US 356, 6 S Ct 1064, 30 L Ed 220 (1885), by the fact that Hicks and Bailleaux claimed to have been discriminated against because they were not members of a minority race. It is doubtful that those opinions could survive modern equal protection analysis, let alone article I, section 20.

opportunity of a preliminary hearing, with the procedural rights described above, offers important advantages over prosecution upon an indictment without a preliminary hearing.

We do not follow the Hawkins court to the conclusion, however, that this difference between two available procedures necessarily represents a denial of equal protection of the laws, regardless of showing which defendants receive one or the other procedure. Hawkins reached this conclusion in "classification" terms, by defining as two classes those who are indicted and those who are charged by information. But we think this is an example of the "circular" use of the concept of "class" mentioned above. The distinction to be tested is the use or nonuse of preliminary hearings. The "classes" said to fail the test of equal protection are the "class" of those defendants who receive preliminary hearings (because charged by information) and the "class" of those who do not (because indicted). But these defendants do not exist as categories or as classes with distinguishing characteristics before and apart from a prosecutor's decision how to charge one, or some, or all defendants. Aside from the manner in which the decision is made, see City of Klamath Falls, supra, 289 Or at 784-785 (Lent, J, dissenting), defendants charged under either procedure are "classes" only as an effect of the dual procedural scheme itself. As in City of Klamath Fallas [sic], supra, "these defendants [i.e. those who do not receive a preliminary hearing] are not denied such a 'privilege' as individual persons, but

only because they are members of a 'class' of persons who are prosecuted [by indictment] as distinct from persons prosecuted [on an information]." 289 Or at 776.

Each of the two procedures, however, is expressly authorized by the constitution itself. Properly administered, each satisfies the fourteenth amendment. Hurtado v. California, 110 US 516, 28 L Ed 232 (1884); cf. Beck v. Washington, 369 US 541, 82 S Ct 955, 8 L Ed 2d 98 (1962); Cassell v. Texas, 339 US 282, 70 S Ct 629, 94 L Ed 839 (1950). As stated above, the administration of laws and procedures provided in the constitution nonetheless must meet other constitutional standards, but the mere coexistence of the two procedures so as to limit preliminary hearings to one of them does not constitute forbidden class legislation. Without a showing that the administration of Or Const art VII, § 5 and ORS 135.070--135.185 in fact denied defendant individually, or a class to which he belongs, the equal privilege of a preliminary hearing with other citizens of the state similarly situated, the circuit court did not err in denying the motion to dismiss the indictment.

Fourteenth amendment equal protection. This court often has stated that for most purposes analysis under article I, section 20 and under the federal equal protection clause will coincide, see, e.g., School Dist. No. 12 v. Wasco County, 270 Or 622, 529 P2d 386 (1975); State v. Savage, 96 Or 53, 184 P 567 (1919), although of course a law found to be invalid under article I, section 20 would not also be tested under the federal constitution. In this case, as in Jarvill v.

City of Eugene, supra, we conclude that the same reasons why the challenged scheme does not on its face violate article I, section 20, also suffice for it to survive similar scrutiny under the fourteenth amendment. 289 Or at 184, 185. Defendant has cited no decision of the United States Supreme Court to compel a contrary conclusion, and Hawkins, as stated above, was decided under the California constitution.

II. Denial of immunity.

Defendant also moved to dismiss the indictment on the grounds, first, that the state's decision to prosecute defendant and grant immunity to potential codefendants were made "without benefit of or reference to any written or otherwise articulated standards and guidelines" and without judicial scrutiny, and second, that the state thereby was able to obtain the testimony of witnesses who would not testify without immunity while denying defendant similar access to testimony, in both respects denying him equal protection of the law.

The facts are that defendant was one of four students at Oregon State University implicated in the theft of chairs from a university basement. Two of the students were granted full immunity from prosecution and became prosecution witnesses against defendant. The circuit court denied defendant's motion, citing State v. Grabill, 34 Or App 639, 579 P2d 316 (1978), in which the Court of Appeals held that Wardius v. Oregon, 412 US 470, 93 S Ct 2208, 37 L Ed 2d 82 (1978), did not

require giving a defendant equal power with the state to immunize a witness from prosecution.

Defendant criticizes Grabill, arguing that the issue is not equal power to immunize a witness from prosecution but only the limited opportunity to compel a reluctant witness to testify by assuring the witness that his testimony cannot later be used against himself. The distinction may be well taken. Nevertheless, it does not help defendant's attack on the trial court's denial of his motion. As stated above, the motion claimed a denial of equal protections. Wardius was a decision under the fourteenth amendment's due process clause. Article I, section 20, speaks of equal privileges or immunities between citizens, not between a citizen and the government, and defendant points to no contrary interpretation of the equal protection clause.[13]

The Court of Appeals rejected defendant's attack on the grant of immunity to the other potential defendants by stating that "[t]he district attorney, as the prosecutor, answers to the electorate for the conduct of his office" and that the exercise of his discretion is "not subject to judicial supervision." 47 Or

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[13] Moreover, defendant did not call a witness who refused to testify without immunity against later use of his testimony, nor did he otherwise show that such testimony would have been available to him. Under the circumstances, it is not apparent how the issue could be raised on a motion to dismiss the indictment.

App at 391-392. That reason overstates the point. State and local officials, school board members, sheriffs, even judges answer to the electorate for the conduct of their offices and are nonetheless held to constitutional limits in the exercise of the discretion entrusted to them. District attorneys are state officers applying statewide, not local law.[14] Their discretionary decisions, even if not subject to judicial "supervision," are not immune from judicial scrutiny. See, e.g., State v. Jones, 279 Or 55, 566 P2d 867 (1977); In re Roger Rook, 276 Or 695, 556 P2d 1351 (1976); State v. Langley, 214 Or 445, 315 P2d 560, 323 P2d 301 (1958). As stated in Dickinson v. Davis, 277 Or 665, 673, 561 P2d 1019 (1977), about penalties under the motor carrier laws,

> "discretion is not a magic word. It is only a range of responsible choice in pursuing one or several objectives more or less broadly indicated by the legislature (or, in Oregon, sometimes by the people themselves) under various circumstances pertinent to those objectives. This applies to a discretionary choice of sanctions just as to other delegated authority."

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[14] Or Const art VII (orig), § 17 provided:

> "There shall be elected by districts comprised of one, or more counties, a sufficient number of prosecuting Attorneys, who shall be the law officers of the State, and of the counties within their respective districts, and shall perform such duties pertaining to the administration of Law, and general police as the Legislative Assembly may direct."

See also ORS 8.650 - 8.680.

As far as equal protection is concerned, the principles of analysis would be similar to those set forth in Part I, above. We may assume that there are impermissible reasons for granting immunity to one or a class of citizens; those, after all, are the very terms of article I, section 20. See also note 12 supra; In re Roger Rook, supra; State v. Langley, supra. However, as with respect to his motion to dismiss the indictment for lack of a preliminary hearing, defendant has made no effort to show that the handling of his case violated those principles. Rather, he attacks the range of the prosecutor's discretion without previously stated standards as a denial of equal protection on its face. We do not believe equal protection goes so far as to require previously stated standards as long as no discriminatory practice or illegitimate motive is shown and the use of discretion has a defensible explanation. See Dickinson v. Davis, supra, 277 Or at 673, K. C. Davis, Administrative Law of the Seventies, §§4.08, 28.00-28.00-6 (1976).

The Court of Appeals found that there was such an explanation in this case.

> "The evidence showed that a number of persons were involved in the criminal activities for which defendant was indicted. Several of those individuals pleaded guilty to one or two charges and were granted immunity from further prosecution in exchange for their testimony against defendant before the grand jury and at his several trials. The prosecutor in charge of the cases testified that he treated defendant differently because the

> investigation showed that defendant was the instigator of many of the crimes and had demonstrated that he was a greater threat to society than the other individuals."

47 Or App at 392. We agree with the Court of Appeals that it was not error to reject the motion to dismiss the indictment.

Affirmed.

TONGUE, J., specially concurring.

I concur in the result reached by the majority. I disagree, however, with the lengthy discussion by the majority of the reasons why the denial of defendant's demand for a preliminary hearing did not violate his rights under Article I, Section 20 of the Oregon Constitution.

To anyone reading the majority opinion it would appear that this problem was the primary focus of the contentions by the parties on the appeal of this case. In defendant's brief to the Court of Appeals, however, defendant did not cite Article I, Section 20 of the Oregon Constitution, much less discuss in any detail its application in this case, but contended only that the disparity between the procedural rights afforded defendants charged by information and by indictment resulted in "constitutionally infirm inequities," citing the California case of Hawkins v. Superior Court, 150 Cal Rptr 435, 586 P2d 911 (1978).[1]

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[1] This court has previously held in Megdal v. Board of Commissioners, 288 Or 293, 296, 605 P2d 273 (1980), that:

In defendant's petition for review to this court defendant not only did not cite Article I, Section 20, but appears to have abandoned the contention that his rights under Article I, Section 20 of the Oregon Constitution were violated. Thus, defendant's contention in this court is that:

> "The present constitutional framework in Oregon violates federal equal protection and due process guarantees.
>
> "It is axiomatic that State constitutional provisions cannot be violative of federal constitutional rights any more than State legislative enactments can.
>
> "* * * * *
>
> "This State's failure to afford procedural protections to Defendants is as much a denial of federal equal protection guarantees as the denial of substantive rights under the law."

(Cont.) "* * * Constitutional claims should identify the provisions of the constitution, state and federal, that the governmental action is said to contravene and should show the relevance of these provisions to the claim."

To the same effect, see Rogers v. Department of Revenue, 284 Or 409, 412 n. 2,587 P2d 91 (1978), and Fifth Avenue Corp. v. Washington Co., 282 Or 591, 594 n. 2, 581 P2d 50 (1978). See also Linde, Without Due Process, 49 Or L Rev 125, 142-43, 183 (1969).

Indeed, the majority in this case recognizes that "defendant has made no effort to show that the handling of his case violated those principles," i.e., the "principles" of Article I, Section 20 of the Oregon Constitution (slip op. p. 17).

At the time of oral argument in this case, defendant's counsel was specifically asked whether he relied upon Article I, Section 20. His reply was that he relied upon federal equal protection and did not rely upon Article I, Section 20. In any event, he made no attempt to do so in the course of his argument before this court.

On this record it is interesting, to say the least, that the opinion by the majority has disposed of defendant's contention that the denial of a preliminary hearing violated his federal constitutional rights to equal protection in one paragraph (slip op. p. 14), while devoting ten pages to a discussion of defendant's rights under Article I, Section 20 of the Oregon Constitution (slip op. pp. 4-14).

In the course of that lengthy discussion, the majority not only traces the development of the caselaw under Article I, Section 20, but undertakes an analysis of that constitutional provision and its application in various situations including, but not limited to, the problem presented in this case--all without the benefit of the adversary process and despite the fact that no such analysis was contended for by any party to this case.

An example may be found in that portion of the majority analysis of Article I, Section 20 as that analysis relates to defendant's demand for a preliminary hearing when the prosecution is by indictment, rather than by information. There the majority discusses the effect of the fact that the discretion accorded to prosecuting attorneys to charge either by

information or by indictment is also based upon provisions of the Oregon Constitution, Article VII, Section 5 (slip op. p. 13). Indeed, the fact that such a procedure is expressly authorized by Article VII, Section 5 may well be the reason why defendant chose to abandon reliance upon the "equal privilege" provisions in the Oregon Constitution, Article I, Section 20, and to rely solely upon the "equal protection" provisions of the Federal Constitution.

Nevertheless, the majority undertook to decide this important question by its holding in a footnote that:

> "The fact that a procedure, a power, or a program is itself stated in the constitution, as are the provisions for indictment and information, does not relieve them from compliance with other constitutional standards unless these are expressly excluded. There are many such provisions placed in the Oregon Constitution (e.g. sale of alcoholic liquor, art I, § 39, educational funding, art VIII, §§ 2-5, and the bonding authorities of article XI-A through H) that are not thereby placed beyond the guarantees in article I, the Bill of Rights." (Slip op. p. 3, n. 5).

This may or may not be correct, but it is a holding made without benefit of the adversary process and one that may have widespread effect. Suppose, as an example, that the people of Oregon adopt by initiative a constitutional amendment providing either for mandatory minimum sentences or for a death penalty. Would such an amendment to the Oregon Constitution be invalid under the holding by the

majority in this case because it conflicts with Article I, Section 15, which provides that; "[l]aws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice"?

The majority opinion, in its lengthy discussion and analysis of Article I, Section 20, without benefit of the adversary process, is reminiscent of the recent opinion in Sterling v. Cupp, 290 Or 611, 625 P2d 123 (1981), joined by two other members of this court, in which the writer of that opinion undertook to decide that case upon the basis of another provision of the Oregon Constitution and on a theory completely different than the theory on which the case had been tried and briefed by the parties on appeal and petition for review.

In a specially concurring opinion in that case it was said, after citing decisions of the court holding that it will not decide a case upon a theory different from the theory on which the case was tried, that:

> "If the adversary process, which is basic to our system of jurisprudence, is to be respected, the fact that this court is now a court of review, rather than a court of direct appeal, cannot properly justify a different result because to hold to the contrary would leave the parties free on petitions for review to propose, if not demand, that this court reverse either the trial court or the Court of Appeals for reasons based upon theories completely

different from the theory upon which the case was both tried and appealed to the Court of Appeals." (Sterling v. Cupp, 290 Or at 635).

Finally, I must concur in the result reached by the majority by a specially concurring opinion because otherwise I would be acquiescing in the long delay in the decision of this case. This is another case which was "assigned but unwritten" for approximately six months before a proposed opinion was written and one which decides a case primarily upon the basis of an elaborate discussion and analysis of a provision of the Oregon Constitution which was not relied upon or discussed by the parties either on appeal to the Court of Appeals or on petition for review to this court.[2]

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[2] See concurring opinion in Sterling v. Cupp, 290 Or 611, 625 P2d 123 (1981). Cf concurring opinions in Ore-Ida Foods, Inc. v. Indian Head Cattle Co., 290 Or 909, 627 P2d 469, (1981); State v. Quinn, 290 Or 383, 623 P2d 630 (1981); Haynes v. Burks, 290 Or 75, 619 P2d 632 (1980); and State v. Classen, 285 Or 221, 590 P2d 1198 (1979).

No. 441--July 28, 1980

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Respondent,

v.

ANDREW CLARK,
Appellant.

(No. 35188, CA 15862)

Appeal from Circuit Court, Benton County.

Frank D. Knight, Judge.

Argued and submitted May 30, 1980.

Robert J. McCrea, Eugene, argued the cause for appellant. With him on the brief was Morrow, McCrea & Divita, P.C., Eugene.

John C. Bradley, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief were James M. Brown, Attorney General, and Walter L. Barrie, Solicitor General, Salem.

Before Schwab, Chief Judge, and Thornton and Richardson, Judges.

RICHARDSON, J.

Affirmed.

RICHARDSON, J.

Defendant appeals a judgment of conviction for theft in the second degree. He contends that the court erred in denying two pretrial motions for dismissal of the indictment. The basis of the first motion was that defendant was denied the opportunity, accorded to the state, to grant immunity from prosecution to prospective witnesses and that he was not offered immunity the same as other potential co-defendants. He argues that his right to due process of law and equal protection of the laws under the Fourteenth Amendment were therefore violated.

In State v. Grabill, 34 Or App 639, 579 P2d 316, rev den 284 Or 521 (1978), we held that the defendant's constitutional rights were not violated when he was not accorded the right to grant immunity to a witness. The same rationale would apply in the situation where the state declines to offer immunity to an accused. If the state determines it will not offer immunity to a particular person, the defendant has no right, based on statute or constitutional provisions, to insist on a grant of immunity.

Defendant makes an additional argument. He contends that the prosecutor's decision to grant immunity is not bound by any criteria and is not subject to judicial scrutiny. Thus, he contends, immunity is granted or withheld at the whim of the state, and similarly situated individuals are treated differently based on this whim.

The decision to prosecute or to grant immunity is within the discretion of the prosecutor. The district attorney, as the prosecutor, answers to the electorate for the conduct of his office, including the exercise of discretion to prosecute.

In an analogous situation, in State ex rel Anderson v. Haas, 43 Or App 169, 602 P2d 346 (1979), rev den 288 Or 493 (1980), we held that when the diversion statute, ORS 135.881 et seq., gave the prosecutor discretion in proposing a diversion plan for a defendant, a particular defendant could not insist on statutory or constitutional grounds that diversion be offered to him. The exercise of that discretion is not subject to judicial supervision.

During the course of the hearing on defendant's motion to dismiss, he presented evidence that seven indictments had been returned charging him with various crimes, including the charge here under review. The evidence showed that a number of persons were involved in the criminal activities for which defendant was indicted. Several of those individuals pleaded guilty to one or two charges and were granted immunity from further prosecution in exchange for their testimony against defendant before the grand jury and at his several trials. The prosecutor in charge of the cases testified that he treated defendant differently because the investigation showed that defendant was the instigator of many of the crimes and had demonstrated that he was a greater threat to society than the other individuals.

Even if there is a constitutional basis for challenging the exercise of prosecutorial discretion to grant immunity, the evidence discloses a rational basis for treating defendant differently than the other individuals involved in the criminal activities with defendant. The first motion to dismiss was properly rejected.

In the second motion to dismiss, defendant alleged his constitutional rights to equal protection of the law and due process were violated because he was not given a post-indictment preliminary hearing. This contention has, on a number of occasions, been decided contrary to the position of defendant. State v. Phelps, 8 Or App 198, 493 P2d 1059 (1972); State v. Sanford, 245 Or 397, 421 P2d 988 (1966); State v. Walley, 1 Or App 189, 460 P2d 370 (1969).

Affirmed.

" IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR BENTON COUNTY

STATE OF OREGON,	)	
	)	
Plaintiff,	)	
	)	Case No. 35188
vs.	)	
	)	ORDER DENYING DEFENDANT'S
ANDREW CLARK,	)	MOTION FOR DISMISSAL OF
	)	INDICTMENT
Defendant.	)	

This matter came before the Court on April 13, 1979, the Honorable Frank D. Knight presiding. The defendant did not appear, but was represented by counsel, Robert J. McCrea and Paul R. Frisch. Michael J. Brown, Deputy District Attorney, also appeared.

Defendant seeks dismissal of the action arguing in effect that he is entitled under the terms of the Oregon and United States Constitutions to an adversarial preliminary hearing as a prerequisite to the prosecution of the matter. More specifically, defendant contends that as a consequence of being indicted by a Grand Jury, rather than being bound over following a preliminary hearing, he has been deprived of the "equal protection" and "due process" guaranteed all criminal defendants by the Oregon and United States Constitutions.

Although it is undeniable that there exists a disparity in the procedural rights afforded defendants charged by means of an information, which is the product of a preliminary hearing, and

defendants charged by a Grand Jury in an indictment, the Court finds that the disparity--a function of the differing nature of the proceeding, one being adversarial, the other being investigative--does not result in any denial of "due process" or "equal protection." Defendant has pointed to no case law, and the Court has not uncovered any, which suggests that under the Federal Constitution there exists any right to a preliminary hearing; the available law, does, in fact, suggest otherwise.

Article VII section 5 of the Oregon Constitution specifically provides that a person "shall be charged in Circuit Court with the commission of any crime punishable as a felony only on indictment by a Grand Jury" except that a district attorney "may" charge a person on an information if, after a preliminary hearing before a magistrate, the person has been held to answer upon a showing of probable cause. The alternatives are themselves specifically provided by Constitution. Unlike a Grand Jury proceeding which is nonadversarial in nature, a preliminary hearing results in a direct confrontation between a potential defendant and the state; as a result the accused is necessarily afforded a variety of procedural rights which are not also necessary where evidence is considered by a Grand Jury which conducts an investigation in accordance with procedural rules and safeguards which are themselves sufficient to guarantee that no criminal charge will be unwarranted.

IT IS HEREBY ORDERED that defendant's Motion for Dismissal of Indictment be, and is, DENIED.

DATED this 19 day of July, 1979 nunc pro tunc the 18 day of June, 1979.

/s/ Frank D. [K]night
CIRCUIT JUDGE "

" IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR BENTON COUNTY

STATE OF OREGON,	)	
	)	
Plaintiff,	)	
	)	Case No. 35188
vs.	)	
	)	ORDER DENYING DEFENDANT'S
ANDREW CLARK,	)	MOTION TO DISMISS
	)	INDICTMENT
Defendant.	)	

This matter came before the Court on May 31, 1979, the Honorable Frank D. Knight presiding. The defendant did not appear but was represented by counsel Robert J. McCrea and Paul R. Frisch. Michael J. Brown, Deputy District Attorney, also appeared and was sworn as a witness.

Evidence produced indicates that several of the State's witnesses have been granted immunity from prosecution; defendant contends that as a consequence he had been denied "equal protection of the law" and asks that the matter be dismissed. Neither the fact that uhlike [sic] the State, defendant does not have the authority to immunize prospective witnesses nor the fact that defendant was not also offered immunity served to deprive defendant of the equal protection of due process to which he is entitled. State v. Grabill, 34 Or App 639 (1978).

Accordingly, it is hereby ORDERED that defendant's Motion to Dismiss be, and hereby is DENIED.

DATED this 19 day of July, 1979, nunc pro tunc the 18 day of June, 1979.

/s/ Frank D. Knight
Circuit Judge "

APPENDIX B

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. Oregon Revised Statutes

OREGON REVISED STATUTES

The Oregon Revised Statutes involved are:

132.090 Presence of persons at sittings or deliberations of jury. (1) No person other than the district attorney or a witness actually under examination shall be present during the sittings of the grand jury; provided, however, that upon a motion filed by the district attorney in the circuit court, the circuit judge may appoint a reporter who shall attend the sittings of such grand jury and take and report the testimony in any matters pending before the grand jury; and provided further, that the circuit judge, upon the district attorney's showing to the court that it is necessary for the proper examination of a witness appearing before the grand jury, may appoint an interpreter, guard, a medical or other special attendant or a nurse, who shall be present in the grand jury room and shall attend such sittings.

GRAND JURY PROCEDURES

132.310 Inquiry into crimes; presentation to court. The grand jury shall retire into a private room and may inquire into crimes committed or triable in the county and present them to the court, either by presentment or indictment, as provided in ORS 132.310 to 132.390. [Amended by 1973 c.836 §45]

PRELIMINARY HEARING
(Generally)

135.070 Information as to charge, right to counsel, use of statement and preliminary hearing. When the defendant against whom an information has been filed in a preliminary proceeding appears before a magistrate on a charge of having committed a crime punishable as a felony, before any further proceedings are had the magistrate shall read to him the information and shall inform him:

(1) Of his right to the aid of counsel, that he is not required to make a statement and that any statement made by him may be used against him.

(2) That he is entitled to a preliminary hearing and of the nature of a preliminary hearing. If a preliminary hearing is requested, it shall be held as soon as practicable but in any event within five days, unless such time is extended for good cause shown. [Formerly 133.610]

135.073 Statement by defendant when not advised of rights. Evidence obtained directly or indirectly as a result of failure of a magistrate to comply with ORS 135.070 shall not be admissible before the grand jury. [1973 c.836 §61]

135.075 Obtaining counsel. The magistrate shall allow the defendant a reasonable time to obtain counsel and shall adjourn the proceeding for that purpose. A defendant who is committed pending examination shall be given a reasonable

opportunity to obtain counsel, including but not limited to a reasonable use of the telephone. [Formerly 133.620]

135.080 [Formerly 133.635; repealed by 1979 c.867 §18]

Note: 135.080 is repealed effective July 1, 1980. See section 19, chapter 867, Oregon Laws 1979. 135.080 (1977 Replacement Part) is set forth for the users' convenience.

Upon completion of all services by the counsel so appointed under ORS 135.050, the counsel shall submit to the court an affidavit containing an accurate statement of all reasonable expenses paid or incurred in connection with such services, supported by appropriate receipts or vouchers. The court shall thereupon enter an order directing the county in which the proceeding is had to pay the counsel the amount of the expenses, or such portion thereof as may be approved by the court, together with fees as set forth in subsection (1) of ORS 135.055.

135.085 Subpenaing [sic] witnesses.

(1) The magistrate shall issue subpenas [sic] for any witness within the state when requested by the district attorney or the defendant for the preliminary hearing.

(2) If either party desires to subpena [sic] more than five witnesses at public expense, application therefor shall be made in the manner provided in ORS 136.570.

(3) Any defendant may have subpenas [sic] issued for any number of witnesses at his own expense without an order of the magistrate. [Formerly 133.660]

135.090 Examination of adverse witnesses. The witnesses shall be examined in the presence of the defendant and may be cross-examined in his behalf or against him. [Formerly 133.670]

135.095 Right of defendant to make or waive making a statement. When the examination of the witnesses on the part of the state is closed, the magistrate shall inform the defendant that it is his right to make a statement in relation to the charge against him; that the statement is designed to enable him, if he sees fit, to answer the charge and explain the facts alleged against him; that he is at liberty to waive making a statement; and that his waiver cannot be used against him on the trial. [Formerly 133.680]

135.100 Statement of defendant. (1) If the defendant chooses to make a statement, the magistrate shall take it in writing, without oath, and shall put to the defendant the following questions only:

(a) What is your name and age?

(b) Where were you born?

(c) Where do you reside and how long have you resided there?

(d) What is your business or occupation?

(e) Give any explanation you think proper of the circumstances appearing in the testimony against you and state any facts which you think will tend to your exculpation.

(2) The answer of the defendant to each of the questions shall be read to him as it is taken down. He may thereupon correct or add to his answer until it is made conformable to what he declares to be the truth.

(3) The statement of the defendant shall be reduced to writing by the magistrate or under his direction and authenticated in the following form:

(a) It shall set forth that the defendant was informed of his rights, as provided in ORS 135.095, and that after being so informed he made the statement.

(b) It need not contain the questions put to the defendant, but shall contain his answers thereto, with the corrections and additions, if any are made.

(c) It may be signed by the defendant, but if he refuses to sign it, his reason therefor shall be stated as he gives it.

(d) It shall be signed and certified to by the magistrate. [Formerly 133.690]

135.105 Use of statement before grand jury or on trial. The statement of the defendant is competent testimony to be laid before the grand jury and may be given in evidence at the trial. [Formerly 133.700]

135.115 Memorandum of waiver of right to make statement. If the defendant waives his right to make a statement, the magistrate shall make a memorandum thereof in the proceedings; but the fact of his waiver cannot be used against the defendant on the trial. [Formerly 133.710]

135.120 [Repealed by 1973 c.836 §358]

135.125 Examination of defendant's witnesses. After the waiver of the defendant to make a statement or after he has made it, his witnesses, if he produces any, shall be sworn and examined. [Formerly 133.720]

135.130 [Repealed by 1973 c.836 §358]

135.135 Exclusion of witnesses during examination of others. The magistrate may exclude the witnesses who have not been examined during the examination of the defendant or of a witness for the state or the defendant. [Formerly 133.730]

135.145 Memorandum relative to witnesses. The testimony of the witnesses need not be reduced to writing, but the magistrate shall make a memorandum of the name of each witness, his place of residence and his business or occupation. [Formerly 133.740]

135.150 [Repealed by 1973 c.836 §358]

135.155 Retention of statements and depositions by magistrate; inspection. The magistrate shall keep the statement and depositions taken on the information, the statement of the defendant, if any, together with the memoranda mentioned in ORS 135.115 and 135.145, until they are returned to the proper court and shall not permit them to be inspected by any person, except the district attorney of the county or the attorney who acts for him and the defendant and his counsel. [Formerly 133.750]

(Compelling Witnesses)

136.617 Proceedings to compel witness who may be incriminated thereby to testify. In any criminal proceeding before a court of record or in any proceeding before a grand jury, or in any proceeding before a court of record under ORS 646.760, if a witness refuses to testify or produce evidence of any kind on the ground that he may be incriminated thereby, and if the prosecuting attorney moves the court to order the witness to testify or produce evidence, the court shall forthwith hold a summary hearing at which the witness may show cause why he should not be compelled to testify or produce evidence, and the court shall order the witness to testify or produce evidence regarding the subject matter under inquiry unless the court finds that to do so would be clearly contrary to the public interest. The court shall hold the summary hearing outside the presence of the jury and the public and may require the prosecuting attorney to disclose the purpose for which he seeks the testimony or evidence. The witness shall be entitled to be represented by counsel at the summary hearing. [Formerly 139.190; 1975 c.255 §14]

136.619 Immunity of witness compelled to testify. After complying with the order to testify or produce evidence the witness shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any fact or act concerning which, in accordance with the order, he was required to testify or produce evidence. The witness may nevertheless

be prosecuted for any perjury or false swearing committed in accordance with the order and the witness shall be subject to penalty for contempt of court for failure to comply with the order. [Formerly 139.200]

131.005 General definitions.

(9) "District attorney's information" means a written accusation by a district attorney and:

(a) If filed with a magistrate to charge a person with the commission of an offense, other than an offense punishable as a felony, serves both to commence an action and as a basis for prosecution thereof; or

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. _____

ANDREW CLARK, Petitioner

v.

STATE OF OREGON, Respondent

PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE STATE OF OREGON

PROOF OF SERVICE

I certify that I am a member of the bar of the Supreme Court of the United States and that pursuant to Rule 28.5, the foregoing Petition for a Writ of Certiorari was served upon Mr. David B. Frohnmayer, Attorney General, of attorneys for Respondent, on September 26, 1981 by mailing to him a certified true copy thereof by First

Class mail, postage prepaid, addressed to him at 100 State Office Building, Salem, Oregon, 97310, which is his regular office mailing address.

All parties required to be served have been served.

The foregoing is true as I verily believe.

J. P. GRAFF
Of Attorneys for Petitioner

STATE OF OREGON)
) ss.
County of Lane)

Subscribed and sworn to before me this 24th day of September 1981.

Notary Public for Oregon
My commission expires: 7-26-84

Opposition

FILED
OCT 30 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-629

In the Supreme Court of the United States

OCTOBER TERM, 1981

ANDREW CLARK,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of the
State of Oregon

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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*WILLIAM F. GARY
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Counsel for Respondent

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QUESTIONS PRESENTED

Respondent submits that the questions presented are more succinctly and accurately stated as follows:

1. Are Oregon constitutional and statutory provisions establishing two alternative procedures for charging a person with the commission of a felony, a grand jury indictment or a district attorney's information and preliminary hearing, violative on their face of the Equal Protection Clause or Due Process Clause of the Fourteenth Amendment to the United States Constitution because the prosecutor has discretion as to which procedure to use?

2. Does the Oregon statute empowering the state to grant immunity to witnesses deny petitioner due process of law in the absence of a reciprocal right in favor of petitioner?

3. Does the Oregon statute empowering the state to grant immunity to witnesses deny petitioner equal protection because the prosecutor has discretion as to whom to offer immunity?

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United States v. Batchelder, 442 U.S. 114, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979) 3, 4, 5

Respondent State of Oregon respectfully prays that this Court deny petitioner Andrew Clark's petition for writ of certiorari. The petitioner seeks review of the Oregon Supreme Court's opinion in *State of Oregon v. Clark*, 291 Or. 231, 630 P.2d 810 (1981).

OPINIONS BELOW

Oregon accepts petitioner's statement of the opinions below.

JURISDICTION

Oregon accepts petitioner's statement of jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Oregon accepts petitioners's statement.

STATEMENT OF THE CASE

Oregon accepts as accurate petitioner's statement of the case with the exception of his representation that the issues raised in his petition were encompassed by his Motions to Dismiss. (Petition for Writ of Certiorari at 16). Petitioner's motions did not raise the second question presented.

Defendant was convicted of theft in the second degree. On appeal, he assigned as error the trial court's denial of two pretrial motions to dismiss the indictment on constitutional grounds. One of these motions claimed that the failure to accord defendant a preliminary hearing after his indictment denied him due process and equal protection of the law under

federal constitutional provisions. The second motion to dismiss the indictment claimed that defendant was denied equal protection of the law because he could not obtain the testimony of witnesses by granting them immunity from the state's use of their testimony in criminal prosecutions against the witness, as the state may do, and because he was prosecuted and potential codefendants were given immunity without reference to any standards for the disparate treatment. At trial petitioner called no witnesses who refused to testify without immunity. The Oregon Court of Appeals rejected these constitutional claims. The Oregon Supreme Court allowed review and affirmed the conviction.

REASONS FOR DENYING THE WRIT

The First Question Presented Raises No Substantial Federal Issues Not Previously Decided By This Court

Petitioner does not challenge the well-established rule that a state is not required to charge a felon through any particular procedure. *Hurtado v. California*, 110 U.S. 516, 4 S. Ct. 111, 28 L. Ed. 232 (1884). Petitioner does not assert that either the grand jury procedure or the preliminary hearing procedure do not meet due process requirements for the charging of the commission of a felony. Petitioner has identified no other "fundamental interest" affected by the state constitutional and statutory provisions challenged.

Petitioner does not identify any "class" of which he is a member, which the challenged constitutional or statutory provisions treat differently from some other "class." To the contrary, petitioner correctly points out that the only "class" affected by the provisions are those persons charged with felonies. Petitioner claims that he is entitled to the same protections as all other members of that class. This is undisputed. However, the constitutional and statutory provisions challenged do not on their face treat him differently than any other person similarly situated. The protections afforded by these provisions are (1) to be charged by way of grand jury indictment or by district attorney's information and preliminary hearing and (2) to be free of unconstitutional discrimination by the prosecutor in the exercise of his discretion. *United States v. Batchelder*, 442 U.S. 114, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979); *Oyler v. Boles*, 368 U.S. 448, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962). There has been no assertion, let alone a showing, of any discrimination by the prosecutor.

Petitioner's claim of denial of equal protection boils down to the assertion that it is impermissible for a state to invest its prosecutors with discretion to choose between two constitutional procedures to charge the commission of a felony. This Court has already held that, subject to constitutional restraints, a government may exercise discretion in deciding whether or

not to prosecute a particular offense, *Bordenkircher v. Hayes,* 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978); *Oyler v. Boles, supra*, that it may exercise discretion in deciding what crime to charge if the defendant's conduct violates more than one statute, *Rosenberg v. United States*, 346 U.S. 273, 73 S. Ct. 1152, 97 L. Ed. 1607 (1953), and that it may exercise discretion in deciding which statute to prosecute under when different penalties are provided for identical conduct, *United States v. Batchelder, supra.* In each of these situations the exercise of prosecutorial discretion has a much more profound inpact on the defendant than the exercise of discretion challenged here. Therefore, petitioner's first claim does not present a substantial federal question not previously decided by this Court.

The Second Question Presented By The Petition Is Not Properly Before The Court.

Petitioner's claim that his inability to grant immunity to witnesses denies him due process of law is not properly before the Court for two reasons. First, petitioner's Motion to Dismiss before the state trial court was grounded on denial of equal protection. This was the only claim considered and decided by the trial court. The Oregon Supreme Court recognized that petitioner's due process claim was not presented to the trial court and declined to consider it on review. (Petition for Writ of Certiorari, A-22). Likewise, this Court

has declined to consider claims, including constitutional claims made by criminal defendants, when not properly presented to and decided by the courts below. *Tennessee v. Dunlap*, 426 U.S. 312, 96 S. Ct. 2099, 48 L. Ed. 2d 660 (1976); *Estelle v. Williams*, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 126 (1976).

Second, a motion to dismiss an indictment does not raise the issue of denial of due process arising out of petitioner's inability to grant immunity to witnesses where petitioner did not call any witnesses who refused to testify without immunity. The Oregon Supreme Court also noted this defect in the record. (Petition for Writ of Certiorari, A-22, note 13).

Because the issue has not been properly presented, this Court should decline to consider it.

The Third Question Presented for Review Raises No Substantial Federal Issues Not Previously Decided By This Court.

Petitioner asserts that the Oregon statute empowering the state to grant immunity to witnesses denies him equal protection because there are no standards to govern the exercise of prosecutorial discretion. This Court has rejected similar attacks on prosecutorial discretion, noting that its exercise is subject to constitutional restraints. *United States v. Batchelder, supra*; *Oyler v. Boles, supra*. The Oregon statute does not afford the petitioner, or any other person, any other

protection. This issue is substantially similar to issues previously decided by this Court.

CONCLUSION

Petitioner seeks review of issues that were correctly resolved below. The issues presented are not of major significance; they are adequately and properly resolved by the prior decisions of this Court. The petition for writ of certiorari should be denied.

Respectively submitted,

DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Solicitor General
CHRISTINE L. DICKEY
Assistant Attorney General
Counsel for Respondent

October 22, 1981